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No. 84-233

IN THE

Supreme Court of the United States

October Term 1984

PHILLIPS PETROLEUM COMPANY,
Petitioner,

vs.

IRL SHUTTS, *et al.*,
Respondent.

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF AMICUS CURIAE THE NATIONAL ASSOCIATION OF INDEPENDENT INSURERS IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF KANSAS

DUANE C. QUAINI*
WILLIAM T. BARKER
ROBERT H. KING, JR.
SONNENSCHEIN CARLIN
NATH & ROSENTHAL
8000 Sears Tower
Chicago, Illinois 60606
(312) 876-8000
Attorneys for Amicus Curiae the National Association of Independent Insurers

* Counsel of Record

Pandick Midwest, Inc., Chicago • 454-7600

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MOTION OF AMICUS CURIAE THE NATIONAL ASSOCIATION OF INDEPENDENT INSURERS FOR LEAVE TO FILE BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF KANSAS

Pursuant to Supreme Court Rule 36.1, the National Association of Independent Insurers (the "NAII") moves for leave to file the accompanying brief in support of the petition for a writ of certiorari filed herein by petitioner Phillips Petroleum Company.

The NAII is the largest insurance trade association in the United States. It is composed of over 500 insurance companies writing policies of property and casualty insurance in all fifty states. By permitting maintenance of nationwide class actions in the courts of Kansas despite the absent class members' conceded lack of any contacts with Kansas, and by applying

Kansas law to adjudicate the claims of all class members, including non-residents of that state, the decision below poses a substantial threat to the interests of the members of the NAII. Because they serve millions of consumers located in every state, members of the NAII are especially likely to become involved in such nationwide class actions. Those class actions would present unique problems to the insurance industry, particularly if they were to be determined solely pursuant to the law of the forum state, since insurers are subject to varying forms of extensive regulation by each of the fifty states.

Accordingly, the NAII believes that it will present arguments to this Court that will not be presented in the same form by the parties.

The NAII, the Alliance of American Insurers and the American Insurance Association were granted leave to file an amicus brief in the case of *Gillette Co. v. Miner,* 456 U.S. 914 (1982), which also questioned the propriety of nationwide class actions.

The NAII has sought the consent of counsel for petitioners, Joseph W. Kennedy, and counsel for respondent, W. Luke Chapin, for leave to file the accompanying brief. Counsel for respondent denied this request.

For the foregoing reasons, the National Association of Independent Insurers prays that this Court grant its motion for leave to file the accompanying brief in support of the petition for a writ of certiorari to the Supreme Court of Illinois in the case of *Phillips Petroleum Co. v. Shutts.*

Respectfully submitted,

DUANE C. QUAINI*
WILLIAM T. BARKER
ROBERT H. KING, JR.
SONNENSCHEIN CARLIN NATH
& ROSENTHAL
Attorneys for Amicus
Curiae the National
Association of Independent
Insurers

* Counsel of Record

September 10, 1984

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BRIEF OF AMICUS CURIAE THE NATIONAL ASSOCIATION OF INDEPENDENT INSURERS IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF KANSAS

This Brief, in support of the Petition for a Writ of Certiorari is submitted in accordance with Rule 36.3 of the Rules of this Court.

INTEREST OF THE AMICUS CURIAE

Amicus, the National Association of Independent Insurers ("NAII"), is a trade association composed of over 500 property and casualty insurance companies of all types—stock, mutual, reciprocal and Lloyd's Plans. 156 of its members are licensed to do business in Kansas, representing $295,586,275 in premium volume in that state alone.

The interest of the NAII as *amicus* arises out of the impact which the decision below may have on (1) class action litigation in which members of the association become involved and (2) the orderly regulation of the business of insurance in the United States.

In the McCarran-Ferguson Insurance Regulation Act of 1945, Congress declared that "the continued regulation and taxation by the several States of the business of insurance is in the public interest. . . ." 15 U.S.C. § 1011 (1976). In response to that Act, and in order to preserve their primacy in the field of insurance regulation, the states have adopted separate statutes and administrative regulations comprehensively regulating the business of insurance, including such matters as property and casualty insurance rates, cancellation and non-renewal of automobile and homeowners insurance policies, insurance

holding companies and unfair and deceptive trade practices.[1] As a result, this Court has recognized that "[w]hen the States speak in the field of 'insurance,' they speak with the authority of a long tradition." *S.E.C. v. Variable Annuity Life Insurance Co.*, 359 U.S. 65, 68-69 (1959).

The insurance practices which are separately regulated by the state insurance codes and administrative regulations have in recent years been the subjects of numerous consumer class actions in state courts.[2] When a class is limited to policyholders who are residents of one state, the insurance laws and regulations of the forum are applied to resident policyholders who are plainly subject to the court's *in personam* jurisdiction. In a nationwide class action, however, the rights of California policyholders, under statutes and regulations administered by the California Department of Insurance, might be determined by a Kansas court which lacks *in personam* jurisdiction over both the California policyholders and the Department. Indeed, under the ruling below, an even more impermissible result

[1] A catalog of the rate regulation, deceptive trade practices, and holding company statutes of the fifty states is contained in a publication of the Illinois Department of Insurance, *Insurance Regulation and Antitrust: The Effect of the Repeal of the McCarran-Ferguson Act* 24 nn.22, 24, 26 (1979). The statutes governing the cancellation and nonrenewal of automobile insurance are described in the American Insurance Association's *Summary of Selected State Laws and Regulations Relating to Automobile Insurance* 20-40 (1979).

[2] *See, e.g., Steward v. Allstate Ins. Co.*, 92 Ill. App. 3d 637, 415 N.E.2d 1206 (1st Dist. 1980) (cancellation and non-renewal); *Spirek v. State Farm Mutual Automobile Ins. Co.*, 65 Ill. App. 3d 440, 382 N.E.2d 111 (1st Dist. 1978) (subrogation rights under automobile insurance policies); *Nye v. Erie Ins. Exch.*, 470 A.2d 98 (Pa. 1983) (right to no-fault insurance benefits for income lost by deceased accident victims); *Thomas v. Liberty Nat. Life Ins. Co.*, 368 So.2d 254 (Ala. 1979) (interest on benefit payments); *Civil Service Employees Ins. Co. v. Superior Court*, 22 Cal. 3d 362, 584 P. 2d 497, 149 Cal. Rptr. 360 (1978) (benefits under "medical expense" clause in policy).

might obtain were a nationwide class action involving insurance matters to be filed in Kansas. Since the Kansas Supreme Court held that it was proper to resolve the claims of all non-Kansas owners of Phillips Petroleum Company royalties under Kansas law, it might similarly apply Kansas insurance laws to adjudicate the claims of California policyholders.

The prospect of having the courts of one state intrude on the independent regulation of the insurance business in the other forty-nine states, in matters involving thousands or millions of policyholders having no contacts with the forum, threatens to disrupt the Congressionally recognized right of each state to regulate that business within its jurisdiction as it sees fit. Accordingly, the NAII submits that the decision below is one of substantial significance warranting this Court's review.

SUMMARY OF ARGUMENT

A state court may not exercise jurisdiction over absent class plaintiffs who have no contacts with the forum. The "minimum contacts" test of personal jurisdiction developed by this Court must be applied to all parties who have not consented by affirmative act to a state court's jurisdiction.

The importance of this question is demonstrated by this Court's grant of certiorari in *Gillette Co.* v. *Miner*, 456 U.S. 914 (1982), presenting an almost identical issue. Moreover, the courts of some states have already held that judgments purporting to bind absent class members beyond the class action court's jurisdiction violate due process and will not be accorded full faith and credit in those states. Only this Court can resolve the dispute among state courts on this issue.

The decision below permits not only the assertion of jurisdiction over non-resident plaintiffs with *no* contacts with the forum, but also the application of Kansas law to the claims of absent class members having *no* contact with Kansas. Such a holding, if applied to insurance cases, could result in extensive interference with the present system of insurance regulation.

REASONS FOR GRANTING THE WRIT

BY PERMITTING KANSAS COURTS TO EXERCISE JURISDICTION OVER ABSENT CLASS MEMBERS WHO HAVE NO CONTACTS WITH KANSAS, THE DECISION BELOW CONTRAVENES EVERY DECISION OF THIS COURT SINCE *INTERNATIONAL SHOE* ON PERSONAL JURISDICTION.

THE DECISION OF THE SUPREME COURT OF KANSAS THREATENS TO DISRUPT THE REGULATION OF THE BUSINESS OF INSURANCE BY SUBJECTING INSURERS TO NATIONWIDE CLASS ACTION LITIGATION IN THE COURTS OF ONE STATE ON ISSUES PROPERLY DETERMINED BY THE LAWS, INSURANCE DEPARTMENTS, AND COURTS OF EACH STATE IN WHICH THE DISPUTED TRANSACTIONS OCCURRED.[3]

It is axiomatic that a state court may not exercise jurisdiction in any case in which the parties and the subject matter of the litigation lack "minimum contacts" with the forum. *See, e.g., International Shoe Co. v. Washington,* 326 U.S. 310 (1945).

The Kansas Supreme Court, however, held that the "minimum contacts" test applies only to non-resident defendants and does not apply at all to absent class plaintiffs. Petitioner's Appendix at A-12 to A-13. Notice and an opportunity to be heard were sufficient, in the Kansas court's view, to empower Kansas to assert personal jurisdiction over non-consenting, non-resident class members having *no* contacts whatsoever with Kansas. *Id.* at A-12.

These rulings plainly violate this Court's decisions which hold that state court jurisdiction is constrained by the "minimum contacts" test. For the reasons discussed *supra,* this constraint applies with particular force in cases involving insurance regulation, to which the NAII's member companies are frequently parties.

[3] In addition to the grounds cited herein, the NAII adopts the reasons for granting the writ advanced by Philips Petroleum Company in its Petition for a Writ of Certiorari.

A. A State Court May Not Assert Jurisdiction Over Non-Consenting Litigants Having No Contact With The Forum.

Contrary to the holding of the Kansas Supreme Court, even when it is not unfair to a litigant to require his appearance in a particular forum, absence of "minimum contacts" precludes the exercise of jurisdiction. In *Rush v. Savchuk,* 444 U.S. 320 (1980), this Court held that state court jurisdiction over an insured defendant may not be based solely upon the presence within the state of an insurance company that has undertaken a contractual obligation to defend and indemnify him in connection with the suit. *Id.* at 328-33. This Court accordingly reversed a holding that in those circumstances, jurisdiction could be asserted whether or not the named defendant had "minimum contacts" with the jurisdiction because the burden of the case fell on the insurer:

> The State's ability to exert its power over the "nominal defendant" is analytically prerequisite to the insurer's entry into the case as a garnishee. If the Constitution forbids the assertion of jurisdiction over the insured based on the policy, then there is no conceptual basis for bringing the "garnishee" into the action. Because the party with forum contacts can only be reached through the out-of-state party, the question of jurisdiction over the nonresident cannot be ignored.

Id. at 330-31 (footnote omitted).

The Court expressly found it unnecessary to refer to "traditional notions of fair play and substantial justice" in a case in which "the defendant has *no* contacts with the forum." *Id.* at 332. Where, as in *Rush,* there are *no* contacts, assertion of jurisdiction is constitutionally barred because the Due Pro-

cess Clause "does not contemplate that a state may make binding a judgment . . . against an individual or corporate defendant with which the state has no contacts, ties, or relations." *International Shoe Co. v. Washington,* 326 U.S. 310, 319 (1945).

The Kansas Supreme Court felt that it could ignore the constitutionally mandated "minimum contacts" test simply because the absent parties were plaintiffs rather than defendants. Petitioner's Appendix, A-12.

To the contrary, however, the requirements of the Due Process Clause cannot be affected by the alignment of parties as plaintiffs or defendants.[4] Mere notice and an opportunity to be heard is constitutionally insufficient to justify a state court's assertion of jurisdiction over a non-resident defendant. A non-resident plaintiff class-member similarly cannot be compelled to take affirmative action to avoid a Kansas court's assertion of jurisdiction over his person based merely on notice and an opportunity to be heard.[5] "[*A*]*ll* assertions of state court jurisdiction must be evaluated according to the standards set forth in *International Shoe* and its progeny." *Shaffer v. Heitner,* 433 U.S. 186, 212 (1977) (emphasis added).

The decision below is thus directly at odds with all of this Court's prior decisions forbidding exercise of personal jurisdic-

[4] *See Vanderbilt v. Vanderbilt,* 354 U.S. 416, 418-19 (1957) (alimony rights of absentee respondent in divorce proceeding); *New York Life Ins. Co. v. Dunlevy,* 241 U.S. 518 (1916) (right of adverse claimant in interpleader action). *See generally* Note, *Multistate Plaintiff Class Actions,* 92 Harv. L. Rev. 718, 726 nn.70-73 (1979).

[5] On the other hand, there is nothing constitutionally impermissible in a state court's assertion of jurisdiction over a non-resident plaintiff's voluntarily filed claim against a non-resident defendant if the plaintiff suffered damage in the state and the cause of action arises out of the activity being conducted by the defendant in the state. *Keeton v. Hustler Magazine, Inc.,* 104 S. Ct. (1984).

tion over a non-resident who has *no* contacts with the forum.[6] Moreover, at least two states have already ruled that nationwide class actions are improper on the ground that a state court could not exercise jurisdiction over claims of nonresidents lacking minimum contracts with the forum.[7] In such states, the validity of a judgment against a nationwide class obtained by insurers who successfully defend Kansas action would not be accorded full faith and credit. Only a determination now by this Court as to the propriety of nationwide class actions in state courts can avoid the chaos which will be caused by the inconsistent judgments of various jurisdictions on this issue.

B. Permitting a Forum State To Apply Its Own Law to Absent Class Members' Claims Having No Connection With The Forum Would Unconstitutionally Interfere With The Interests of Other States, Insurers And Consumers In The Consistent Application Of State Statutes And Regulations Governing Insurance.

"[T]he Due Process Clause ensures not only fairness, but also the 'orderly administration of the laws'. . . ." *World-Wide Volkswagen Corp. v. Woodson,* 444 U.S. 280, 294 (1980)

[6] The Kansas Supreme Court also rejected the argument that the assertion of jurisdiction over absent class members was inconsistent with the status of a state court as an instrumentality of a "coequal sovereign in a federal system." *World-Wide Volkswagen Corp. v. Woodson,* 444 U.S. 286, 292 (1980). While this Court has recently suggested, contrary to its previous decisions, that notions of federalism do not operate as an "independent restriction" on a state court's assertion of personal jurisdiction (*Insurance Corporation of Ireland v. Compagnie Des Bauxites,* 465 U.S. 694, 703 n.10 (1982)), the Court has never held that the "minimum contacts" requirement could be ignored. Rather, it has simply shifted the focus to the non-resident party's right not to be subjected involuntarily to the authority of the courts of a jurisdiction with which that party lacks the "minimum contacts" necessary to confer *in personam* jurisdiction.

[7] *Feldman v. Bates Mfg. Co.,* 143 N.J. Super. 84, 362 A.2d 1177 (App. Div. 1976); *Klemow v. Time, Inc.,* 466 Pa. 189, 352 A.2d 12, *cert. denied,* 429 U.S. 828 (1976).

(quoting *International Shoe Co. v. Washington,* 326 U.S. 310, 319 (1945)). The court below sought to avoid the many problems caused by administering the laws of many states in one proceeding by arbitrarily choosing to apply the law of Kansas to all class members' claims.

"'[T]he Constitution, in all its provisions, looks to an indestructible Union, composed of indestructible States.'" *National League of Cities v. Usery,* 426 U.S. 833, 844 (1976) (quoting *Texas v. White,* 7 Wall. 700, 725 (1869)). One state should not be permitted to violate the sovereignty of the other states by adjudicating a controversy concerning the citizens of the other states under the laws of forum when the forum state itself has little or no interest in the litigation. In the present case, there is no reason to apply Kansas law to claims by unnamed out-of-state plaintiffs except that Kansas attorneys happened to file an action in Kansas before any were filed elsewhere. Indeed, the Kansas Supreme Court did not even purport to identify any Kansas interest that would justify application of Kansas law to the claims of absent class members. However, it is clear that "if a State has only insignificant contact with the parties and the occurrence or transaction, application of its law is unconstitutional." *Allstate Insurance Company v. Hague,* 449 U.S. 302, 311 (1981).

In the insurance context, it is evident that class actions challenging the propriety of policy provisions or other practices could never be constitutionally decided under the forum state's law where absent class members and the acts or transactions in suit had *no* contact with the forum state. The insurance statutes and regulations of the fifty states are both complicated and diverse. Not only has each state adopted its own statutes and promulgated its own regulation but each has developed its own common law. Moreover, in every state, the power to enforce the insurance laws is vested in an Insurance Department or similar body with expertise in that state's law. Thus, even when two states have adopted substantively similar statutes, the

statutes may be interpreted and applied differently by the regulators and the courts of those two states. Consequently, an insurance policy provision or practice approved for use in California by its insurance department might violate the insurance laws of Kansas. But it would be patently absurd—and unconstitutional under the holding of *Hague*—to apply Kansas law to an absent California policyholder's claim in a nationwide class action simply because suit was filed there.

Since the passage of the McCarran-Ferguson Insurance Regulation Act of 1945, 15 U.S.C. 1011-1015 (1976), it has been acknowledged that the public policy of the United States has been to leave insurance regulation to the individual states. *See Prudential Insurance Co. v. Benjamin,* 328 U.S. 408, 429-30 (1945). Recognizing the special interest of the states in issues of insurance regulation, federal courts often decline to exercise their jurisdiction in such cases to avoid interference with the orderly application of state law. *E.g., Levy v. Lewis,* 635 F.2d 960, 963-64 (2nd Cir. 1980); *Smith v. Metropolitan Property & Liability Insurance Co.,* 629 F.2d 757, 760-61 (2nd Cir. 1980); *Allstate Insurance Company v. Sabbagh,* 603 F.2d 228, 233-34 (1st Cir. 1979). Allowing Kansas courts to apply Kansas law in nationwide class actions involving the insurance laws of other states would be totally inconsistent with this Congressionally mandated and judicially enforced scheme of state insurance regulation, and would also be unfairly detrimental to defendants' and absent class members' interests in the orderly application of the law.

Inevitably, then, a state court would be required to analyze and apply each state's insurance codes and regulations to the claims of fifty separate subclasses of plaintiffs. The mammoth complexity of managing of a class action comprised of thousands of plaintiffs divided into fifty sub-classes requiring the application of fifty states' laws has a constitutional dimension as well. It puts such a burden of time and expense on the court

and defendant that due process and a right to a fair trial itself may be lost in the fray.[8]

Parties may always be at some disadvantage when a court attempts to apply unfamiliar foreign law. See *Allstate Insurance Company v. Hague*, 449 U.S. 302, 326 & n.14 (1981) (opinion of Stevens, J., concurring in judgment). However, the possibility of error and confusion is obviously magnified when a court attempts to apply the laws of all fifty states at once. *See, e.g., Spirek v. State Farm Mutual Automobile Insurance Co.*, 65 Ill. App. 3d 440, 453-54, 382 N.E.2d 111, 120-121 (1st Dist. 1978). Such an attempt, no matter how heroic, is inconsistent with the due process interest in the orderly application of laws recognized in *World-Wide Volkswagen*.

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[8] That problems of "manageability" could constitute a denial of defendant-insurer's right to a fair trial is apparent from considering hypothetical nationwide class action alleging breach of an insurance contract. In such a case, a state court would be required to adjudicate every state's statute of limitation, common law regarding breaches of contract, waiver, estoppel, etc., as well as unfamiliar and complex statutes and regulations governing insurance contracts. Moreover, the procedural provisions of each state's insurance statutes and regulations would have to be interpreted in order for the court to rule on such defenses as primary jurisdiction and failure to exhaust administrative remedies. This process would be further complicated by the changes in each state's insurance laws and regulations which might have taken place during the relevant period.

CONCLUSION

For the reasons set forth herein, *amici* respectfully submit that the decision below is of substantial significance warranting this Court's review, and that the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

DUANE C. QUAINI*
WILLIAM T. BARKER
ROBERT H. KING, JR.
SONNENSCHEIN CARLIN
NATH & ROSENTHAL
Attorneys for Amicus Curiae,
the National Association
of Independent Insurers

* Counsel of Record

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